In the Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL in and for the Southern District of New York. } No. 340.

BRIEF FOR THE UNITED STATES IN REPLY TO THE BRIEF OF THE APPELLANT.

FIRST.

The answer to the proposition of appellant's counsel that the subpœna *duces tecum* was defective in that no action was pending and that therefore there was no case or controversy within the meaning of article 3 of the Constitution is involved in the first point of our Brief in which it is contended that the grand jury provided for in the fifth amendment of the Constitution has power (1) to conduct an inquisitorial proceeding and (2) to proceed without a specific charge against a particular person.

Assuming that the court will have no difficulty in saying that any proceeding in which such powers were exercised was, within the meaning of article 3 of the Constitution, a *case* or *controversy*, and there-

fore within the judicial power of the United States, it can not be supposed that by using the words "case" and "controversy" it was intended to *limit* the powers of the grand jury then existing.

SECOND.

A. The general adoption by grand juries in this country of inquisitorial methods seems to be admitted by counsel for the appellant (Appellant's Brief, p. 21). The well known experience of some of the counsel as prosecuting officers gives weight to their testimony.

B. It is said on page 30 of the brief for the appellant that the soundness of the proposition, that "there must at least be pending before them (the grand jury) some specific charge directed against a particular person or persons," was assumed by this court in *Counselman* v. *Hitchcock*. We do not so understand the opinion of the court in that case. In the part of the opinion quoted by counsel it is said:

> "It is contended by the appellant that the grand jury of the District Court was not in the exercise of its proper and legitimate authority in prosecuting the investigation specifically set out in its two reports to the District Court; that those reports could not be made the foundation of any judicial action by the court; that the Interstate Commerce Commission was specially invested by the statute with the authority to investigate violations of the act and charged with that duty; *and that no duty in that respect was imposed upon the grand jury until specific charges had been made.* But in the view we take

> of this case we do not find it necessary to intimate any opinion as to that question *in any of its branches.*"

We understand this language to mean that the court did not express any opinion as to whether there was, in the absence of specific charges, any authority in the grand jury to act.

C. *Lloyd* v. *Carpenter* (Appellant's Brief, p. 33) admits the powers of the grand jury for which we contend, but holds that in Pennsylvania the court places strict limitations upon these powers. That these limitations were narrower than those existing at common law is indicated from the view of the court, that the grand jury acts as "the umpire between the accuser and the accused, instead of assuming the office of the former." This statement of the court is without foundation, for the grand jury was always regarded as an accusing body. Justice Field (2 Sawy., 668) in his well-known charge said of the grand jury that "However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial." (See also *17 Am. & Eng. Enc. of Law*, 2d Ed., p. 1266, 1279, and *State* v. *Branch*, 68 N. C., 186.) It is quite true that the Executive Department through the medium of the Department of Justice has participated in grand jury proceedings and aided in presenting for the consideration of that body facts bearing upon the question

as to whether crime has been committed. But this function is performed merely as an aid to the grand jury in the discharge of the duties which have always been conceded to it as an independent body. To say that the Department of Justice or any other Executive Department of the Government appears to present its case before the grand jury as an umpire and that the grand jury can take no initiative and has abdicated its ancient powers and prerogatives has no foundation beyond the assertion of the counsel for the appellant. Essentially the same procedure now prevails as formerly, varied only, as we have pointed out in our main brief, by the change of conditions under the American form of government. While it is true in a limited sense that the functions of the grand jury are judicial, that is not so in the sense that there is a controversy between parties and a judgment of the court adjudicating upon it. The function of a grand jury is not inaptly defined by the ancient word "inquest," which is still applied to its proceedings. The grand jury inquires; it generally considers only incriminatory evidence. Except as evidence in defense may be incident to or involved in accusing evidence, a grand jury generally has no right to seek for or receive evidence in defense. (*Respublica* v. *Shaffer*, 1 Dallas, 236; *U. S.* v. *Lawrence*, 4 Cranch, C. C., 514; *Wharton's Cr. Pr. & Pl.* (8th ed.), sec. 360.) Only accusing witnesses, that is, witnesses who have knowledge of facts tending to show that the person under investigation has been guilty of a crime, are called before

the grand jury, and it is upon such evidence that that body is called upon to decide whether there are "probbable grounds" that anybody has been guilty of any particular crime. Of course, the jury reach a conclusion or a judgment, but it is an *accusing* judgment, and can be executed only by calling upon the accused person to put in a defense. While in a limited sense this involves a judicial function, the proceeding is *sui generis*, and there is no analogy in the criminal or civil law which may be resorted to for aid in defining its limits.

It is not correct to say that it must be ascertained that a crime has been committed before the grand jury may proceed to inquire. Perhaps that is usually the case where a simple crime such as theft has been committed; but where a crime involving a more complicated examination of facts and law is concerned it is absurd to say that there must be positive information that a crime has been committed before a grand jury may inquire. It has been and it must be that a grand jury is authorized to proceed whenever matters come to their attention from which there arises a greater or less *probability* that there has been a violation of the law. It is aside from the question to compare the inquisitorial method of the star chamber with that before a grand jury. It is true that the star chamber prosecutions were instituted upon suggestion and suspicion and the *ex officio* oath was administered and inquisitorial proceedings conducted, and that from these practices great abuses arose. But while the agitation against the star cham-

ber was going on proceedings before the grand jury continued, and in the very act cited (p. 35) by counsel for the appellant (25 Edward III) an indictment or presentment by a grand jury is contrasted with the proceedings before the star chamber, to show that the former is compatible with the principles of civil liberty. It appeared from this act that it was not inquisitorial proceedings as such that were objected to, but the manner in which the court had conducted them, it being the wish of the people to have such proceedings confined to the body which from time to time came from the neighborhood and held office only until they had finished the work in hand.

The discussion of the powers of a grand jury is not advanced by repeating that such powers are judicial and by considering the nature of judicial powers as exercised by other governmental or judicial bodies, for we thus find ourselves dealing with a question of mere terminology. For instance, it is not useful to compare such a body as was attempted to be created in the statute which was under consideration in the *Matter of Pacific Railway Commission* v. *Stanford* (32 Fed. Rep., 241), because the functions of that body were radically different from those of a grand jury. The question here, however, is: What is the institution which has been known for centuries as the grand jury, and what have been and what are its powers?

In considering this question counsel for the appellant quite candidly states what is the only conclusion to which their view can logically bring them, viz, that

"there can be no exercise of judicial power unless there be *parties* to the proceeding, a *matter in controversy*, an *assertion* on the one hand and a *denial* on the other, and, in short, a distinct *issue* to be *determined*" (p. 35). In short, in order to sustain their contention they would revolutionize the whole grand jury system by giving an accused person the right to be represented before the grand jury, by restricting procedure before that body by pleadings and all the rules of procedure incident thereto, and by having an investigation before a grand jury proceed with all the formality, regularity, and technicality incident to a prosecution upon an indictment. (See *Respublica* v. *Shaffer*, *supra*, on this subject. This, of course, would involve the formulation in the form of a charge of anything brought to the attention of the grand jury by the district attorney or by the charge of the court and would necessarily abolish all secrecy in its proceedings. Whatever may be said in behalf of the wisdom of such a radical change in our system of criminal jurisprudence, it needs no more than a reference to our main brief to show that it is a change which, so far as our research has disclosed, has never before been suggested by anybody, except the counsel for the appellant in this case.

THIRD.

As to whether a grand jury proceeding is included within the words "proceeding, suit, or prosecution" used in the immunity act of 1903.

A. It is quite true that in *Brown* v. *Walker* neither the court nor the counsel made any question as to whether "proceeding," as used in that statute, extended to an investigation before a grand jury; that it did was too obvious. If a doubt had existed about it, it would not have escaped the diligence of the able counsel who presented that case to the court and the attention which the vigorous opinions of dissenting justices show that they gave to the points involved. Counsel suggests that there is some significance in the fact that Congress did not in the act of 1903 use the words which were used in the act of 1893, under consideration in *Brown* v. *Walker*. But this seems to be straining at an argument, when the words which were used in the act of 1903 were clearly sufficient in themselves to include a grand jury proceeding. The omission of the provision that no person should be excused from testifying is commented on; but that provision, as we have shown in our main brief, was wholly unnecessary to compel the witness to testify. While the entire clause was put in a different form, the words in the act of 1903 were equally as apt to describe a proceeding before the grand jury as those in the act of 1893.

An argument is advanced that a concession was made by Congress to the views of the four dissenting

justices in *Brown* v. *Walker*, and particularly to their suggestion of the difficulties that a witness may have in procuring evidence as to what he had previously testified to. But there is absolutely no foundation for making any such argument as that. If any presumption is to be indulged, it is that Congress assumed that the view expressed by the majority of the court was the law, and that no such difficulties as were suggested by Mr. Justice Shiras were real or substantial. Furthermore, these difficulties are much exaggerated by counsel. It is not, as they assert, only on rare occasions that a stenographer is present before the grand jury. As a matter of fact, he is, as he was in the present case, there and taking the minutes of the jury. Furthermore, the testimony of the witness himself would be sufficient to sustain his position that he had been compelled to testify and was immune; and it is extremely unlikely that in the short time before the statute of limitations should have barred a prosecution for any offense, evidence as to what the witness had testified to would have disappeared or become difficult to produce. In the present case it sufficiently appeared by the statement of the assistant district attorney, which, of course, could not be disputed, what the proceeding was; indeed, the statement was so broad that the witness would have immunity from prosecution for any charge under the antitrust law.

The statement of counsel as to the intention of Congress is wholly without any foundation in the policy which has resulted in antitrust and interstate commerce legislation. The whole tendency of that

legislation has been to make it more and more thorough and drastic. There have been obvious and repeated efforts to make immunity legislation effective. There is no evidence in any of the circumstances or in the public discussion of measures to indicate that the assumed difficulties of a witness before the grand jury had any weight with Congress; and if they had, it is equally absurd to suppose that Congress would not have declared such intention in language which would not require such arguments as are now advanced to make it plain.

B. In the brief for the appellant it is said (p. 49) that "the matters which constitute violations of the interstate commerce law could scarcely be the subject of State regulation and the chance of a State prosecution for other causes arising out of disclosures before Federal grand juries so remote as to be negligible." As a matter of fact, a number of States have passed laws prohibiting excessive freight-rate charges and unjust discriminations, granting damages to persons injured, and imposing criminal penalties.

(See Kansas General Statutes, 1901 edition, sec. 5980–5994; Statutes of Iowa, 1897, secs. 2123, 2132; Minnesota Statutes, vol. 2, pp. 83, 87, and sec. 771; Wisconsin Annotated Statutes, Sanborn & Berryman, p. 1079; Nebraska—see *Smyth* v. *Ames*, 169 U. S., 466; Pennsylvania—see *Logan* v. *Pennsylvania R. R. Co.* and statute involved in that case approved June 4, 1883; New York Railroad Law, sec. 38; Colorado, Laws of 1885, chap. 309. See also the following cases: *Alcott* v. *Supervisors*, 16 Wallace, 694; *Railroad* v. *Richmond*,

19 Wallace, 594; *Handley* v. *K. C. S. R. Co.*, 187 U. S., 617; *Minneapolis & St. L.* v. *Minnesota*, 186 U. S., 257.)

C. Counsel for the appellant attempts to refer the word "proceeding" to the preceding portion of the act where "proceedings in equity" and "proceedings" for seizure and condemnation of property are referred to. But these terms are used in a most general way and, from the technical standpoint, inaccurately; for it would be more appropriate to speak of an injunction suit as a "suit in equity" than a "proceeding in equity" and of a "proceeding" for seizure and condemnation as a "suit or action" for that purpose, and the use of the word "suit" in connection with an action at law is inartificial. All of these expressions are obviously used in a general and not a strictly technical sense. No safe argument, therefore, can be based upon the use of the same words in the subsequent part of the statute even if the argument of counsel for the appellant were otherwise sound.

D. The words "proceeding, suit, or prosecution," in the immunity act of February 25, were not used with reference to the antitrust law alone; they were used also with reference (1) to the interstate commerce law, approved February 4, 1887, and (2) to the revenue law, approved August 27, 1894; and they must, therefore, be construed as applying to "proceedings, suits and prosecutions" under those acts as well.

Under the interstate commerce law, as supplemented by the Elkins Act (approved February 19, 1903), certain violations of law are declared to be misdemeanors. Sections 3, 8, and 9 prohibit certain acts and provide

for proceedings in relation thereto. Section 12 provides for certain proceedings before the Commission, and authorizes that body, through the Attorney-General, to prosecute "all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof." The original immunity provision is inserted in this section. It was supplemented by the act of February 11, 1893, which was construed in *Brown* v. *Walker*, and which extended the immunity to testimony given "*in any cause or proceeding, criminal or otherwise*, based upon or growing out of any violation of the interstate commerce law." Section 13 provides for the consideration of any complaint made to the Commission and for the investigation by the Commission and a report. Provision is made for a jury trial.

The revenue act of August 27, 1894, more commonly known as the "Wilson bill," makes provisions similar to those in the antitrust law.

It will thus be seen, therefore, from the three acts referred to in the immunity act of February 25, 1903, that the words "proceeding, suit, or prosecution" used therein referred to a great variety of proceedings, and particularly under the interstate-commerce law, including (1) those before the Commission, (2) those before the circuit court on the application of the Commission, (3) jury trials, (4) suits in equity, (5) forfeiture proceedings, and (6) all those steps necessary to enforce the criminal penalties of the law.

To attempt to construe these words by special reference to proceedings under one of the three acts to

which they were applied is, obviously, an improper and inadequate way of attempting to get at their real significance. The further the examination goes the more clearly it appears that the words were intended to be comprehensive and to include every proceeding, whether criminal or civil, which might be availed of, in order effectually to enforce the remedies provided for by any one of the three acts. In this sense they clearly include a proceeding before the grand jury, which is a part of the usual and proper way of enforcing the criminal penalties of the acts.

E. It is only necessary to reply to the comments of counsel on the subject of the "utility" argument, as they call it, to say that the cases under the antitrust law, and the interstate commerce law, to which they refer, were all based upon specific agreements, easily proven. And, moreover, in those cases and in most of the cases decided before the commerce acts and the anti-trust acts had been fully interpreted and the purpose of the Government to enforce them plainly understood, the refusal by corporations to disclose facts had not become a common thing. Where the agreements have been in writing, and proven without opposition on the part of the corporations, the questions which are now being discussed have not proven to have practical importance. But after a number of constitutional objections to anti-trust legislation have been disposed of by this court, corporations are devising novel reasons why their private affairs should not be subjected to the scrutiny of the courts. When it was thought that the provisions of law could

be avoided on other grounds, there was a large number of cases where corporations freely disclosed their private affairs to the scrutiny of the Government; but when they had been deprived of defenses upon these grounds, obstacles to the enforcement of the law by withholding evidence are being interposed with the greatest ingenuity.

Whatever may be the constitutional rights of the American Tobacco Company and its affiliated companies, it ill becomes it, while it withholds all information as to its operations, involving the management of hundreds of millions of capital and probably affecting the interests of more than half of the population of the country, to advance an argument that this court should not go as far as it constitutionally may, and that the Department of Justice should not avail itself of all the remedies provided by the act, and in such order as it sees fit to adopt, in order to enable the Government to accomplish an effective enforcement of the laws against monopolies and unlawful combinations. Its counsel argue that the chief remedial features of the Sherman Act are proceedings in equity and for the seizure and condemnation of property; and while they admit that a criminal remedy is provided, they say that "there is no occasion for any such prosecution where no *overt act* has been committed." But will it be a difficult matter for any great corporation doing an interstate business, *if it seeks to avoid* the law, to obscure its acts with millions of secret details in such a manner that their real import may be dis-

covered only after a long inquisitorial investigation? Counsel *recommend* that the Government shall proceed by suit in equity, and if, incidentally, some fact is disclosed which makes it appear that a crime has been committed, that specific charges shall be made and submitted to the grand jury, which shall proceed, with all the novel restrictions now devised by counsel, to attempt with all the witnesses successfully pleading their privilege, the impossible task of finding an indictment.

We respectfully submit that this court should not limit itself in determining the questions involved in this case by any such nice suggestions as to the way in which the Government shall perform the duty which is devolved upon it to discover and punish violators of the law. This court should approach this question, not with a view of extending the protections of the Constitution beyond the limits fixed by their well defined historical origin, but rather to interpret the Constitution in such a way that a great public policy, approved by the people of the country, may be enforced, however powerful may be the opposition of the few who are opposed by self-interest to the enforcement of the law.

FOURTH.

As to the Fourth Amendment.

A. We have already pointed out in our main brief that in the case of Wilkes there was no semblance of a judicial proceeding. On the contrary, without authority of law the executive department of the Government seized and took into their possession docu-

mentary evidence. That was a trespass upon the rights of Wilkes and was the basis of Lord Camden's decision. The *motive* for the act was, of course, the obtaining of incriminating evidence; but the *illegal act* was committed before any proceeding was instituted either in any court or before any grand jury. As is said in the extract from May's Constitutional History of England quoted in the appellant's brief, ministers did not wait "to inquire after the accustomed forms of law." Furthermore, the decision is based to some extent (and it would have been a sufficient ground alone) upon the principle that, as the illegal method by which documentary evidence is obtained could not be interposed as an objection to its introduction in evidence (*Adams* v. *New York*), the seizure of the papers by the executive was in effect compelling a person to produce evidence against himself.

B. The fourth amendment legalizes certain searches and seizures; and, as we have just pointed out, the fact that there has been an illegal seizure may not be urged as a reason for the exclusion of evidence which is produced upon a trial. And so, whether the seizure is legal or illegal, the fifth amendment can not be availed of to keep out of evidence the thing seized. To this extent, then, the two amendments do not "run into each other." Furthermore, often, if not generally, a search or seizure is for the very purpose of obtaining incriminating evidence; and objection based on this ground only is not ground for withholding a warrant of search or seizure.

In other words, then, the fourth amendment does not help out the fifth amendment merely because a search or seizure was unreasonable, nor does the fifth amendment help out the fourth amendment by permitting the search or seizure to be declared unreasonable on the ground of incrimination. Despite the expression of this court in the Adams case that it had "no wish to detract from" the authority of the Boyd case, the effect of its decision was inevitably to limit the scope of Justice Bradley's language.

A fact existing in the Boyd case should not be overlooked, namely, that the statute under consideration in that case, in addition to practically compelling a witness to confess a crime, as we have pointed out at page 65 of our main brief, *permitted the attorney for the Government to inspect the papers mentioned in a notice which he was authorized to serve.* This inspection is not permitted when papers are produced in the ordinary way under a subpoena *duces tecum*, and therefore the two cases are for that reason to be differentiated.

C. There is a significant omission in the brief of the appellant of any specific argument based upon either the indefiniteness of description or the volume of papers described in the subpoena *duces tecum.* Counsel has dealt with that feature of the case as being unimportant. On page 73 of the brief it is said that the "extraordinary nature" of the subpœna "must be taken into consideration"; yet no definite deduction is made from this fact. It seems to us that the appellant's counsel are driven into this position by the logic of the

situation; for, as we shall point out below, if their contention be sound there will be an unreasonable search or seizure under the circumstances of this case, even though an officer of the corporation be compelled by the subpœna to produce only a single definitely described document.

D. *Ex parte Brown*, cited on page 76 of appellant's brief, expressly disapproves Judge Dillon's well considered opinion in the *Babcock* case (72 Mo., 96).

E. We are left in some doubt by appellant's brief as to whether counsel contend that the fifth amendment may be asserted in behalf of a corporation by an officer who is a witness, irrespective of the protection of the fourth amendment, as, for instance, when he is asked to answer orally a question which may tend to incriminate the corporation. On pages 74, 77, and 79 of the brief this position seems to be asserted, and yet on page 82 there seems to be a concession that the cases cited fairly sustain the "general proposition that the privilege under the fifth amendment is personal to the witness." As the point was specifically made only in the McAlister assignments of error we argued it fully in the brief in that case and, we submit, have satisfactorily disposed of any contention that the privilege may be asserted in behalf of a corporation. It is only necessary in reply to add a few observations in connection with the authorities cited in the appellant's brief.

The quotation from *Professor Wigmore's* book on evidence, cited on page 77 of the brief, is misleading,

because it is taken out of the context. The full quotation appears upon page 16 of our brief in the *McAlister* case and does not at all sustain the appellant's proposition.

In *Logan* v. *Pennsylvania Railroad* the decision was of the court of first instance. The Supreme Court dismissed the appeal. The decision is not a high authority, nor are the reasons elaborately considered.

The *Davies* case, cited on the same page of the brief, is not important. It was decided under a section of the Code of Civil Procedure of the State of New York, based upon the old rule in chancery, that in a bill of discovery a party to a suit is not compellable to disclose any facts which would subject him to a forfeiture or penalty. This appears from the case of *Phoenix* v. *Dupuy*, 2 Abb. N. C., 146, cited in the *Davies* case. This rule is designed for the protection of parties and, of course, a corporation which is a party to an equity suit comes clearly within its scope and intent.

F. Whether the contention of the counsel (Brief, p. 79) that the decisions of this court that a corporation is a person within the meaning of the fourteenth amendment necessarily leads to the conclusion that within the word "people," used in the fourth amendment, corporations are included, it is not important to inquire. Whatever may be the exact scope of that word, our argument in relation to searches and seizures is not based upon any contention that the fourth amendment may not be availed of in a proper case for the benefit of a corporation. Our contention under this amendment is

that it is not intended to apply to a case of an enforced production of documents under a *subpoena duces tecum.* Whether those papers belong to an individual or to a corporation. But upon the question whether in the fifth amendment the word "person" includes corporations, the decisions under the fourteenth amendment which relate to contract and property rights, have no bearing. To any argument of the appellant's counsel that a privilege against incrimination under the fifth amendment may be availed of by a corporation, we take issue. But we do not base our argument, as stated by appellant's counsel (brief, p. 80), that the protection of the fourth amendment is the personal privilege of the witness. We do, however, say that in withholding from a corporation the privilege under the fifth amendment against incrimination, it resulted that a corporation could not assert the privilege either in respect of oral testimony or of documentary evidence. The privilege against incrimination was available at common law in the case of either kind of evidence, and if an officer has in his custody a letter to the corporation which may tend to incriminate it, he may not refuse to produce it. That only results, however, from the omission of the framers of our Constitution to enlarge the privilege against incriminating evidence in such a way as to include within its scope corporations as well as persons.

Some Federal legislation in relation to interstate commerce is significant in connection with this discussion. In section 3 of an act entitled "An act to

regulate commerce with foreign nations and among the States" (Elkins Act), passed February 19, 1903 (32 Stat. L., 848), it is provided that the courts shall have power to compel the attendance of witnesses and to compel the production of all books and papers, and that "the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or *such corporation producing its books and papers*, but no *person* shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which *he* may testify or produce evidence, documentary or otherwise, in such proceedings." It is very significant that although immunity is furnished to persons on account of testimony given or documentary evidence produced, no such immunity is furnished to a corporation in the case of incriminating evidence it may be compelled to produce. If the contention of counsel were conceded this act would be unconstitutional because (1) it compels a corporation to produce evidence against itself without furnishing immunity and, therefore, is in violation of the fifth amendment, and (2) because the production of documentary evidence by the corporation, whether or not it would incriminate it, would be an unlawful search or seizure. We do not think that the court will so hold, but will rather consider the act above referred to as being an affirmation of the policy of our law that a corporation is not entitled to immunity against incriminating evidence, and that the compul-

sory production of testimony which may incriminate it is not an unlawful search or seizure under the fourth amendment of the Constitution.

If the argument in behalf of the appellant is sound, a witness may be compelled to testify orally to facts which may incriminate a corporation of which he is an officer, because he may not assert the privilege of the fifth amendment in its behalf and may not *under that amendment* object to the production of a letter in his custody belonging to the corporation, yet he may refuse to produce that letter because its production would constitute a search or seizure under the fourth amendment, not because the letter is incriminating, but solely upon the ground that the compulsory production of the letter would be an invasion of the right of privacy and a trespass upon the rights of the corporation. We have taken the instance of a single letter because the argument of counsel does not seem to depend upon the volume of the evidence sought to be obtained or the indefiniteness of the description or the character of the proceeding in which the demand is made. If any such rule as this were adopted by the court, it would apply both to proceedings before a grand jury and to criminal prosecutions and civil causes. It would involve in every case where a single piece of documentary evidence was required to be produced in the ordinary every-day practice in the courts that before a subpœna *duces tecum* or other process of the court were issued, that proof should be furnished that there was "probable cause" (whatever that might mean in an ordinary case), a particular description of the place where it

was thought that the paper was located, and a particular description of the paper itself. Such a result is really a *reductio ad absurdum*. It is impossible that the universal practice has proceeded for so many years and that we are only now discovering the real meaning of a search and seizure.

G. As we have pointed out in our main brief, the case of *Rex* v. *Purnell* was really decided upon the ground that while the books were the nominal property of a corporation, the disclosures contained in them were virtually those of the person against whom it was sought to introduce them in evidence. That is the view of Professor Wigmore (*Wigmore on Evidence*, sec. 2259); and that it is correct appears clearly from the report of the opinion of the court in 1 W. Blackstone, page 45.

HENRY W. TAFT,
FELIX H. LEVY,
Special Assistants to the Attorney-General.

WILLIAM H. MOODY,
Attorney-General.

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